No. 95-963

Supreme Court, U.S.
FILED
JAN 12 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

GREENWOOD TRUST COMPANY,

Petitioner,

v.

JAMES HUNTER,

Respondent.

On Petition For A Writ Of Certiorari
To The New Jersey Supreme Court

AMICI CURIAE BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN J. GILL III
(Counsel of Record)
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5026

ROBERT E. MCKEW
AMERICAN FINANCIAL SERVICES ASSOCIATION
919 18th Street, N.W.
Suite 300
Washington, DC 20006
(202) 296-5544

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
30th Floor
Arlington, VA 22209-3908
(703) 276-1750

18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Certiorari Should Be Granted to Resolve a Direct Conflict Between the New Jersey Supreme Court's Decision and Those of the First Circuit, Third Circuit, and Supreme Courts of California and Colorado 4

II. The Meaning of the Term "Interest" in Section 27 of the FDIA Is An Issue of Substantial Importance 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Hiatts, 82 U.S. (15 Wall.) 177 (1872) 11

In re: Citibank (South Dakota) Credit Card Litigation, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995) 5

Copeland v. MBNA America Bank, N.A., No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995) 5

FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 8

Gadon v. The Chase Manhattan Bank (USA), 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending) 5

Greenwood Trust Co. v. Massachusetts, 776 F.Supp. 21 (D. Mass. 1991), *rev'd*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) 5, 9, 12

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995) 5

Marquette National Bank v. First of Omaha Corp., 439 U.S. 299 (1978) 8

Mazaika v. Bank One, Columbus, N.A., 439 Pa. Super. 95, 653 A.2d 640 (1994), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995) 5

NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 115 S. Ct. 810 (1995) 8

TABLE OF AUTHORITIES – Continued

Page(s)

Richardson v. Citibank (South Dakota), N.A., No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) 5

Sherman v. Citibank (South Dakota), N.A., No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995) 4

Smiley v. Citibank (South Dakota), N.A., 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995) 5, 10, 11, 12

Spellman v. Meridian Bank (Delaware), Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) 5, 9, 10, 12

Stoorman v. Greenwood Trust Co., No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) 5

Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1874) 11

STATUTES AND RULES

12 U.S.C. §85 ..... *passim*

12 U.S.C. §1463(g) 2, 12

12 U.S.C. §1785(g) 2, 12

12 U.S.C. §1831d ..... *passim*

Supreme Court Rule 10(b) 4

TABLE OF AUTHORITIES – Continued

Page(s)

MISCELLANEOUS

42 Fed. Reg. 11,924 (March 3, 1995) 7

Card Industry Directory (Faulkner & Grey 1996) at 18 9

BANKING AGENCY OPINION LETTERS

FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992) 6, 12

OCC Interpretive Letter No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,618 (Feb. 17, 1995) 6, 7

Letter of Harry W. Quillian, FHLBB Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 at p. 62,403 (June 27, 1986) 7

Letter of Richard S. Schulman, Acting Assoc. Gen. Counsel, NCUA, 62 Banking Rep. (BNA) 766 (Apr. 11, 1994) 7

Letter of Karen Solomon, OTS Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 (Sept. 29, 1994) 7

This amici curiae brief is filed by the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), and the Consumer Bankers Association ("CBA") in support of the Petition for a Writ of Certiorari filed by Greenwood Trust Company ("Greenwood"). The ABA, AFSA and CBA agree with Petitioner that a writ of certiorari should be granted in this case. Petitioner and Respondent have each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

The ABA is the largest national trade association of the commercial banking industry in the United States. It represents banks of all types and sizes: national banks and state-chartered banks; money center, regional and community banks; and both independent banks and banks owned by bank holding companies. There are ABA member banks in each of the 50 states and in the District of Columbia. In the aggregate, ABA member banks represent approximately 90 percent of the domestic assets of all American commercial banks.

The AFSA represents over 300 companies operating more than 10,000 offices that are engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned finance companies to the nation's largest financial services, retail and automobile companies. AFSA also represents numerous depository institutions.

The CBA was founded in 1919 to represent retail banks nationwide. Today, it represents approximately 750

bank holding companies, banks and thrift institutions that represent nearly 80 percent of all consumer credit held by federally-insured depository institutions. The CBA focuses on retail issues, including deposit, investment, and lending products and services. Its membership includes bank holding companies, regional, superregional, and money center banks, thrifts, and credit unions.

The meaning of the term "interest" in Section 27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d, has significance not only to Amici's members who are federally-insured state banks, but also to other federally-insured depository institutions as well. The language of Section 27 of the FDIA is virtually identical to that of Section 85 of the National Bank Act ("NBA"), 12 U.S.C. § 85, applicable to national banks, Section 4(g) of the Home Owners' Loan Act, 12 U.S.C. § 1463(g), applicable to federally-insured savings institutions, and Section 205(g) of the Federal Credit Union Act, 12 U.S.C. § 1785(g), applicable to federally-insured credit unions. Since the courts and federal banking agencies have uniformly held that the term "interest" has the same meaning in all of these statutes, this case is very important to all of Amici's members.

Also, Amici have a strong interest in this case because the interpretation of the meaning of "interest" in Section 27 of the FDIA affects not just credit card lending, but all types of lending. Moreover, the New Jersey Supreme Court's decision in this case has profound

implications for both interstate lending and intrastate lending by the Amici's members.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve a direct conflict between the New Jersey Supreme Court, which held that late charges are not "interest" under federal banking law, and the United States Courts of Appeals for the First Circuit and Third Circuit and the Supreme Courts of California and Colorado, all of which have reached a contrary conclusion. Also, the New Jersey Supreme Court's decision conflicts with numerous opinions by all of the federal banking agencies, which have held that late charges are "interest" under the federal banking laws.

Resolution of the conflict in the courts below is very important because of the great uncertainty that now exists with respect to the meaning of "interest" and the legality of the interstate exportation of late fees. Numerous states have laws that prohibit or limit late charges, and credit card issuers in states that allow late charges have relied on Section 27 of the FDIA and Section 85 of the NBA for many years to export late charges to credit cardmembers throughout the country. Amici's members can no longer be sure whether their long-established interstate lending practices are permitted under federal law, and the current lack of uniformity and predictability adversely affects both lenders and borrowers. Also, there are numerous class actions throughout the country against Amici's members involving the exportation of credit card late charges and other charges, and

many more class actions are likely to be filed as a result of the New Jersey decision. These cases seek billions of dollars in damages, and if the New Jersey decision is followed by other courts the potential liability could be ruinous to many of Amici's members.

ARGUMENT

I. Certiorari Should Be Granted to Resolve a Direct Conflict Between the New Jersey Supreme Court's Decision and Those of the First Circuit, Third Circuit, and Supreme Courts of California and Colorado

A writ of certiorari should be granted in this case pursuant to Supreme Court Rule 10(b) because a state court of last resort has decided an important federal question in a way that directly conflicts with the decisions of two other state courts of last resort and two United States courts of appeals.

The New Jersey Supreme Court ruled 4-3 in this case that the term "interest" in Section 27 of the FDIA does not include flat late charges, and instead is limited to periodic percentage rates. It reached the same conclusion with respect to Section 85 of the NBA in a companion case involving a national bank. *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995), *petition for certiorari pending*, No. 95-991 (U.S. Dec. 21, 1995).[1]

[1] Pennsylvania's intermediate appellate court has also held that late charges are not "interest" under Section 27 of the FDIA

The New Jersey Supreme Court holding squarely conflicts with decisions by the First Circuit Court of Appeals, Third Circuit Court of Appeals, California Supreme Court, and Colorado Supreme Court, all of which have held that late charges assessed by credit card issuers *are* "interest" under Section 27 of the FDIA and Section 85 of the NBA. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993); *Spellman v. Meridian Bank (Delaware)*, Nos. 94-3203, 3204, 3215-18, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995); *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal.4th 138, 44 Cal.Rptr.2d 441, 900 P.2d 690 (1995), *petition for certiorari pending*, No. 95-860 (U.S. Nov. 30, 1995); *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App.4th 1563, 35 Cal.Rptr.2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal.Rptr.2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417, 46 Cal.Rptr.2d 748 (Cal. 1995), *petition for certiorari pending*, No. 95-951 (U.S. Dec. 18, 1995); *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995); *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for certiorari pending*, No. 95-1056 (U.S. Dec. 28, 1995); *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995).

---

and Section 85 of the NBA. *Mazaika v. Bank One, Columbus, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *allocatur granted*, 659 A.2d 557 (Pa. May 25, 1995); *In re: Citibank (South Dakota) Credit Card Litigation*, 439 Pa. Super. 79, 653 A.2d 39 (1995), *allocatur granted*, 659 A.2d 984 (Pa. May 31, 1995); *Gadon v. The Chase Manhattan Bank (USA)*, 439 Pa. Super. 210, 653 A.2d 697 (1995) (appeal pending).

As a result of the conflicts in the courts below, the determination of whether or not a particular card issuer's late charge is "interest" under Section 27 of the FDIA now depends on the vagaries of where suit is brought. For instance, although the First Circuit Court of Appeals and Colorado Supreme Court have specifically held that Greenwood's late charge is "interest" for purposes of Section 27 of the FDIA, the New Jersey Supreme Court and Pennsylvania Superior Court have both held that Greenwood's late charge is not "interest" that may be exported under Section 27. Within the Third Circuit, a conflict exists between the Court of Appeals and the state courts of New Jersey and Pennsylvania concerning the meaning of "interest" in Section 85 of the NBA and Section 27 of the FIDA.

The New Jersey decision also conflicts with statutory interpretations by all of the federal banking agencies. The Federal Deposit Insurance Corporation ("FDIC"), which is responsible for enforcing and interpreting the Federal Deposit Insurance Act, has opined that credit card late charges are "interest" under Section 27 of the Act. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992). The FDIC also expressed this opinion in *amicus* briefs it filed in the First Circuit, New Jersey Supreme Court, and Colorado Supreme Court.

The Office of the Comptroller of the Currency ("OCC") has rendered several opinions that late charges are "interest" under Section 85 of the NBA, the most recent of which was in OCC Interpretive Letter No. 670, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH)

¶ 83,618 (Feb. 17, 1995). The OCC has also recently proposed an Interpretive Ruling that sets forth its position that late charges are "interest" under Section 85 of the NBA. *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (March 3, 1995). Also, the OCC filed *amicus* briefs in the New Jersey, California, Colorado and Pennsylvania Supreme Courts urging them to hold that late charges are "interest" under Section 85.

As stated earlier, language virtually identical to that found in Section 27 of the FDIA and Section 85 of the NBA also appears in the statutes governing the "interest" that may be charged by federally-insured savings institutions (12 U.S.C. § 1463(g)) and federally-insured credit unions (12 U.S.C. § 1785(g)). The federal banking agencies charged with interpreting those statutes have concluded, like the FDIC and OCC, that late charges are "interest" under those statutes. *See* Letter of Karen Solomon, Office of Thrift Supervision Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 (Sept. 29, 1994) (interpreting 12 U.S.C. § 1463(g)); Letter of Harry W. Quillian, Federal Home Loan Bank Board Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,852 at p. 62,403 (June 27, 1986) (interpreting predecessor of 12 U.S.C. § 1463(g)); Letter of Richard S. Schulman, National Credit Union Administration Acting Associate General Counsel, 62 Banking Rep. (BNA) 766 (April 11, 1994) (interpreting 12 U.S.C. § 1785(g)).

Amici's members rely on the statutory interpretations by their regulators, and those interpretations were improperly disregarded by the New Jersey Supreme Court. This Court has made it clear that deference should

be accorded to the FDIC's interpretation of the FDIA and the OCC's interpretation of the NBA where, as is the case here, those interpretations are reasonable and fully consistent with the statutory language at issue. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995).

In light of the conflicts in the courts below, the entire banking industry is now faced with tremendous uncertainty regarding the legality under federal law of the long-standing practice of exporting late charges from states that allow such charges into those that either prohibit or restrict them. Billions of dollars are involved, and therefore it is essential to Amici's members that this Court resolve the conflicts in the courts below. As this Court emphasized in *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299, 312 (1978), allowing uncertainty to exist concerning the meaning of the language used in Section 85 of the NBA (or Section 27 of the FDIA) would "throw into confusion the complex system of modern interstate banking."

II. The Meaning of the Term "Interest" in Section 27 of the FDIA Is An Issue of Substantial Importance

The interpretation of the meaning of "interest" in Section 27 of the FDIA is an issue of substantial national importance for many different reasons.

Scores of class action lawsuits were filed around the country against the nation's leading credit card issuers following the later-reversed November, 1991 decision by the district court in *Greenwood Trust v. Massachusetts* holding that credit card late charges are not "interest" under Section 27 of the FDIA. 776 F.Supp. 21 (D. Mass. 1991). These lawsuits seek hundreds of millions (if not billions) of dollars in damages for late charges imposed over a number of years.[2] If the New Jersey Supreme Court decision is allowed to stand, more suits are sure to be brought in the many states that prohibit late charges altogether or limit their amounts. The enormous damages sought in these cases could cause tremendous harm to many of Amici's members.

In the Third Circuit's very recent decision holding that late charges are "interest" under Section 85 of the NBA, the Court emphasized that "applying Section 85 only to periodic percentage rates would lead to an unworkable and undesirable hodgepodge of fee limits, and periodic rate provisions, under the laws of both the bank's state and the borrower's state." *Spellman v. Meridian Bank (Delaware), supra,* 1995 U.S. App. LEXIS 37149 at

---

[2] In 1994 alone, the credit card industry collected approximately $2 billion in late charges. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

*62. The Third Circuit also explained that limiting the meaning of "interest" to periodic percentage rates would dramatically alter the overall "package" of terms and fees utilized by card issuers:

> States often allow lenders to utilize a variety of credit card charges as an integrated package. The Supreme Court noted this point in *Marquette*, 439 U.S. at 302-03, in which it discussed a Nebraska law that set higher percentage rates than did Minnesota law. The Court observed, 'To compensate for the reduced [annual rate of] interest, Minnesota law permits banks to charge annual fees of up to $15 for the privilege of using a bank credit card.' *Id.* Some states could, for example, decide to limit lenders' use of late fees if those lenders are also imposing certain periodic rates. [Plaintiff's] interpretation could therefore result in a borrower in one of these states being subject to the periodic rate limits but not to the limits on other loan charges as well.

Id. at *62-*63.

If credit card issuers are restricted in their late charge authority, they may be forced to raise their periodic interest rates to all cardholders in order to recover the losses caused by the late payers. In *Smiley v. Citibank (South Dakota)*, the California Supreme Court stated that late payment "causes various costs relating to default, including collection – costs that may be especially high when, as is typically the case in credit card transactions, the underlying loan is unsecured. Late payment fees may be employed to impose default costs on late payers, who are responsible for them, and to avoid shifting them to timely

payers, who are not. Fairness is served thereby: late payment fees make late payers shoulder the burden they themselves have created." 11 Cal. 4th at 161.

Even though this case only involves late charges, the interpretation of "interest" in Section 27 of the FDIA will necessarily affect the exportation of other fees and charges customarily assessed by credit card issuers, such as annual fees, cash advance fees, non-sufficient funds fees, and over-limit fees. All of these fees have been exported throughout the country from the card issuers' states, whose laws allow such fees, notwithstanding prohibitions or limitations on such fees in a number of states where cardmembers reside. These fees, like late charges, are "interest" because they are imposed "for the use or forbearance of money, or as damages for its detention." *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872).

The interpretation of the meaning of "interest" in Section 27 of the FDIA will have wide-ranging repercussions, since Section 27 governs all types of lending programs, not just credit card lending. Also, Section 27 governs both interstate and intrastate lending by federally-insured state banks.

Insofar as intrastate lending is concerned, Amici's members have long relied on the "most favored lender" doctrine set forth in this Court's opinion in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874), in order to avail themselves of the right to charge the fees permitted to the "most favored lender" located in the same State. As explained by both the Third Circuit and the California Supreme Court, if "interest" is construed narrowly to encompass only periodic percentage rates,

then states could enable certain favored lenders to charge particular fees, and federally-insured depository institutions would no longer be able to borrow the right to assess such fees pursuant to the "most favored lender" doctrine. *Spellman v. Meridian Bank (Delaware)*, 1995 U.S. App. LEXIS 37149 at *62 ("A narrower definition [of 'interest'] would allow states to permit certain favored lenders to assess these charges while denying national banks the same privilege."); *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 154 ("If 'interest' were not read as indicated above [to include fees other than periodic percentage rates], the purpose of facilitating a national banking system by granting national banks 'most favored lender' status in their home states could be frustrated by unfriendly state legislation.").[3]

Moreover, since the language of Section 27 is almost identical to that contained in 12 U.S.C. § 85 (governing national banks), 12 U.S.C. § 1463(g) (governing federally-insured savings institutions), and 12 U.S.C. § 1785(g) (governing federally-insured credit unions), the interpretation of "interest" in Section 27 will affect all types of depository institutions in connection with all of their interstate and intrastate lending programs.

---

[3] Congress conferred upon federally-insured state banks the same "most favored lender" status previously enjoyed by national banks when it borrowed the language used in Section 85 of the NBA in drafting Section 27 of the FDIA in 1980. *Greenwood Trust v. Massachusetts*, 971 F.2d at 826-827; *Hunter v. Greenwood Trust Co.*, 1995 N.J. LEXIS 1354 at *13-*14; *Smiley v. Citibank (South Dakota)*, 11 Cal.4th at 159; FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 (July 8, 1992).

CONCLUSION

For the reasons set forth above, Amici respectfully request the Court to grant the petition for a writ of certiorari in this case.

Respectfully submitted,

JOHN J. GILL III
(Counsel of Record)
MICHAEL F. CROTTY
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 663-5026

ROBERT E. MCKEW
AMERICAN FINANCIAL SERVICES ASSOCIATION
919 18th Street, N.W.
Suite 300
Washington, DC 20006
(202) 296-5544

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
30th Floor
Arlington, VA 22209-3908
(703) 276-1750